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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
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11 DAVID CHARLES THATCHER,

No. CIV S-04-2547-MCE-CMK-P

12 Plaintiff,

13 vs.

FINDINGS AND RECOMMENDATIONS

14 M. PENNER, et al.,

15 Defendants.
16 _____/

17 Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant
18 to 42 U.S.C. § 1983. Pending before the court is defendants' motion for summary judgment
19 (Doc. 30), filed on February 24, 2006. Plaintiff has not filed a response.

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I. STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when it is demonstrated that there exists “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). Under summary judgment practice, the moving party

... always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). “[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the ‘pleadings, depositions, answers to interrogatories, and admissions on file.’” Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. Id. at 322. “[A] complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” Id. In such a circumstance, summary judgment should be granted, “so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied.” Id. at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome

1 of the suit under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986);
 2 T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987), and
 3 that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict
 4 for the nonmoving party, Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

5 In the endeavor to establish the existence of a factual dispute, the opposing party
 6 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the
 7 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
 8 versions of the truth at trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary
 9 judgment is to ‘pierce the pleadings and to assess the proof in order to see whether there is a
 10 genuine need for trial.’” Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory
 11 committee’s note on 1963 amendments).

12 In resolving the summary judgment motion, the court examines the pleadings,
 13 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
 14 any. See Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See
 15 Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed
 16 before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587.
 17 Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s obligation to
 18 produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen
 19 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir.
 20 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than simply
 21 show that there is some metaphysical doubt as to the material facts Where the record taken
 22 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no
 23 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted).

24 On May 18, 2005, the court advised plaintiff of the requirements for opposing a
 25 motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154
 26 F.3d 952 (9th Cir. 1998) (en banc); Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

II. DISCUSSION

Plaintiff claims that defendants violated his rights under the Eight Amendment by acting with deliberate indifference to his medical needs. Plaintiff alleges that defendant Penner, who was at the times mentioned in the complaint a prison doctor, failed to treat him for back and knee pain and Hepatitis C upon his transfer from another prison and thereafter. The complaint does not contain any allegations specifically linking defendant Kernan, the prison warden, to a constitutional violation.

The treatment a prisoner receives in prison and the conditions under which the prisoner is confined are subject to scrutiny under the Eighth Amendment, which prohibits cruel and unusual punishment. See Farmer v. Brennan, 511 U.S. 825, 832 (1994). The Eighth Amendment “. . . embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency.” Estelle v. Gamble, 429 U.S. 97, 102 (1976). A prison official violates the Eighth Amendment only when two requirements are met: (1) objectively, the official’s act or omission must be so serious such that it results in the denial of the minimal civilized measure of life’s necessities; and (2) subjectively, the prison official must have acted unnecessarily and wantonly for the purpose of inflicting harm. See Farmer, 511 U.S. at 834. Thus, to violate the Eighth Amendment, a prison official must have a “sufficiently culpable mind.” See id.

Deliberate indifference to a prisoner’s serious illness or injury, or risks of serious injury or illness, gives rise to a claim under the Eighth Amendment. See Estelle, 429 U.S. at 105; see also Farmer, 511 U.S. at 837. This applies to physical as well as dental and mental health needs. See Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982). An injury or illness is sufficiently serious if the failure to treat a prisoner’s condition could result in further significant injury or the “. . . unnecessary and wanton infliction of pain.” McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992); see also Doty v. County of Lassen, 37 F.3d 540, 546 (9th Cir. 1994). Factors indicating seriousness are: (1) whether a reasonable doctor would think that the condition is worthy of comment; (2) whether the condition significantly impacts the prisoner’s

1 daily activities; and (3) whether the condition is chronic and accompanied by substantial pain.
 2 See Lopez v. Smith, 203 F.3d 1122, 1131-32 (9th Cir. 2000) (en banc).

3 The requirement of deliberate indifference is less stringent in medical needs cases
 4 than in other Eighth Amendment contexts because the responsibility to provide inmates with
 5 medical care does not generally conflict with competing penological concerns. See McGuckin,
 6 974 F.2d at 1060. Thus, deference need not be given to the judgment of prison officials as to
 7 decisions concerning medical needs. See Hunt v. Dental Dep't, 865 F.2d 198, 200 (9th Cir.
 8 1989). The complete denial of medical attention may constitute deliberate indifference. See
 9 Toussaint v. McCarthy, 801 F.2d 1080, 1111 (9th Cir. 1986). Delay in providing medical
 10 treatment, or interference with medical treatment, may also constitute deliberate indifference.
 11 See Lopez, 203 F.3d at 1131. Where delay is alleged, however, the prisoner must also
 12 demonstrate that the delay led to further injury. See McGuckin, 974 F.2d at 1060.

13 Negligence in diagnosing or treating a medical condition does not, however, give
 14 rise to a claim under the Eighth Amendment. See Estelle, 429 U.S. at 106. Moreover, a
 15 difference of opinion between the prisoner and medical providers concerning the appropriate
 16 course of treatment does not give rise to an Eighth Amendment claim. See Jackson v. McIntosh,
 17 90 F.3d 330, 332 (9th Cir. 1996).

18 In this case, defendants assert that there is no genuine issue of material fact as to
 19 deliberate indifference. Specifically, they contend they were not deliberately indifferent in any
 20 way and that plaintiff cannot produce any evidence to the contrary. In support of their position,
 21 defendants offer their individual declarations. In his declaration, defendant Penner states, among
 22 other things, the following:

- 23 1. He was responsible for providing medical care to inmates;
- 24 2. He recalls that, on or about April 6, 2004, he reviewed plaintiff's
 25 administrative appeal and personally interviewed plaintiff and concluded
 26 that plaintiff was suffering from chronic low back and knee pain and
 Hepatitis C;

3. He put plaintiff in a priority position for further medical treatment and, in the meantime, prescribed medication for plaintiff's pain symptoms;
4. At no time did he refuse or fail to provide medical care or treatment to plaintiff; and
5. He never knowingly or intentionally caused plaintiff pain or suffering of any kind or disregarded a risk to plaintiff's health.

Defendant Kernan states:

1. He was the prison warden;
2. He does not recall ever meeting plaintiff and has no knowledge of him; and
3. He never intentionally or deliberately caused plaintiff pain or suffering or disregarded a risk to plaintiff's health.

The court is satisfied that defendants have met their burden under the summary judgment standards of informing the court of their position and identifying the absence of a genuine issue of material fact. The burden now shifts to plaintiff to point to evidence which creates a dispute of fact. Plaintiff, however, has not responded to defendants' summary judgment motion and the allegations in the complaint, without some supporting evidence, cannot create a dispute of fact. In light of defendants' declarations, the best plaintiff can argue is professional negligence. Such a claim would not be cognizable under § 1983 as a matter of law.

III. CONCLUSION

Based on the foregoing, the undersigned recommends that:

1. Defendants' motion for summary judgment be granted; and
2. The Clerk of the Court be directed to enter judgment and close this file.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days after being served with these findings and recommendations, any party may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's

Findings and Recommendations.” Failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: April 25, 2006.


CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE